Office-Supreme Court, U.S.
FILED
AUG 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2190

IN THE

Supreme Court of the United States

October Term, 1980

HADDON HOUSE FOOD PRODUCTS, INC.
AND FLAVOR DELIGHT, INC.,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD AND
TEAMSTERS LOCAL UNION NO. 115, A/W
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR TEAMSTERS LOCAL UNION NO. 115 IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board has discretion under 29 U.S.C. Section 160(c) to remedy an employer's "outrageous" and "pervasive" unfair labor practices by requiring the employer to grant non-employee union representatives access to company property.

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OPINIONS BELOW

The opinion of the court of appeals (App. B1 to B24) is reported at 641 F.2d 984. The decision and order of the National Labor Relations Board (App. C1 to C61) is reported at 242 NLRB 1057.

JURISDICTION

The judgment (App. B1 - B24) of the court of appeals was entered on January 26, 1981. The court of appeals denied the Union's petition for rehearing (App. A1 - A2) on February 28, 1981. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act of 1935, as amended (49 Stat. 449, 29 U.S.C. § 160 (c)), provides, in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act ...

STATEMENT OF THE CASE

A. Facts

Petitioner Teamsters Local Union No. 115 (hereafter "the Union") began organizing the employees of Haddon House Food Products, Inc. and Flavor Delight, Inc. (hereafter the "Company") in November, 1975. On November 13, employees began distributing Union authorization cards in the Company parking lot during the lunch break. A supervisor sitting in his car eating lunch watched four employees move from car to car soliciting their fellow employees to sign the cards. Later, an employee solicited cards in the plant (App. C24, C37).

Early in the morning of November 15, the Company Vice President met with an employee who, during a previous organizing campaign, had been laid off and recalled on the condition that he avoid the union. The employee denied that he was involved in the current Union campaign and was told that he was safe but that some people would be "leaving" that day (App. C37 - C38).

Almost immediately after this conversation, the Company Vice President began discharging employees who had solicited or signed Union authorization cards. Six employees were "laid off" because of lack of work and the Company's poor financial condition; another was ordered to leave immediately. A seventh employee was laid off because he would not work overtime (App. C26 - C37).

Late that afternoon, the Company President conducted a rare meeting of all employees. He explained that there had been layoffs because of a lack of work. Nevertheless, he told the remaining employees to work longer hours. Finally, he stated that although the Company was in poor financial condition and could ill afford it, he would confer with his accountant and would arrange a wage increase to take effect in two days (App. C38 - C39).

Shortly after noon on November 17, Union agents and two employees met with the Company President to demand recognition and gave the Company President 24 signed authorization cards which he examined. Several times, the Company official mentioned that a card signer was no longer employed. After looking at the cards for several minutes, he said that the Union did not represent a majority of his employees. When he stated that the Company had about 40 employees, a Union organizer responded that the Union had more than half that number. Another Company official entered the office, looked at the cards and left to call a lawyer. The Union was advised to contact the Company's attorney (App. C46).

The seven discharged employees began picketing on November 18 at the Company. After work that afternoon, other employees joined the pickets. On the next day, November 19, still others began picketing.

The Company immediately sent a series of form letters to the employees who joined the picket line. The first letter indicated that they were suspended as of November 19, that they would be replaced and that they would be put on "the lowest priority list to be rehired." Several days later, a "clarification" letter advised the pickets that they would be replaced and put on a preferential hiring list (App. C2 - C5).

The Company threatened and discharged employees who continued to work but who demonstrated friendship with the pickets. An employee was called a "two-faced so-and-so" for driving a picket home for lunch and warned that "If you don't watch it, you'll get yours one of these days." (App. C38). On November 25, the Company fired an office employee for talking to strikers and a Union agent. A Company official told her that if she felt like "agitating," she could leave, and directed another employee to escort her from the building (App. C32 - C34).

Several times during the strike, the Union asked the Company to take the employees back. On or after November 24, discharged employees and their striking supporters received letters rescinding their suspension and asking them to report on December 1. Several employees did not receive the letters until after the December 1 "deadline"; others never received the letters (App. C2 - C5). On December 1, the Company informed the Union that it had written everyone and was recalling "everyone." The Union agreed to notify the employees. The next day the strikers met and agreed to return to work on December 4, and the Union so informed the Company (App. C2 - C5).

On December 4, the strikers appeared at the plant, ready to return to work. They were met by police with guard dogs who precluded their return. The Company told the Union that its lawyer had advised against reinstating anyone who missed the December 1 "deadline" specified in the letters. The employees then resumed picketing (App. C2 - C5).

B. The Board's Decision and Order

The Board concluded that the Company had violated Section 8(a)(3) and (1) of the Act by discharging eight employees because

of their Union activity and by refusing to reinstate the unfair labor practice strikers upon their unconditional request and had violated Section 8(a)(1) by threatening to discharge employees to prevent them from engaging in Union activities, by telling them that their fellow employees had been discharged for Union activities, by promising increased benefits to induce employees to abandon the Union, and by telling employees that they were suspended for striking (App. C1 - C5, C26 - C39).

In addition to the normal remedies, the Law Judge concluded that a bargaining order was necessary to remedy the Company's "outrageous and pervasive" unfair labor practices even though the Union had never represented a majority of the Company's employees (App. C57 - C58). The Law Judge found that the Union had signed authorization cards from 27 of the 59 employees in the bargaining unit (App. C52).

The Board declined to impose the proposed bargaining order, because the Union had authorization cards from only 27 of a maximum of 56 bargaining unit employees (App. C5 - C6, n.7). Members Murphy and Truesdale assumed that the Board has authority to issue a bargaining order despite a union's failure to attain majority status, but held that the violations here, while "outrageous" and "pervasive" did not merit a bargaining order (App. C5 - C6). Chairman Fanning and Member Jenkins held that the Board had the authority and should exercise it on these facts (App. C14 - C20). Member Penello held that the Board had no authority to issue a bargaining order where the union had never attained majority support (App. C21). However, the Board *sua sponte* imposed a number of "extraordinary" remedies. It ordered the Company to mail a notice to all employees and to publish copies of the notice in local newspapers of general circulation; to conduct in-plant meetings at which the Company President would read the notice to employees; to give the Union a list of all employees for one year; to give the Union access to plant bulletin board for two years; to permit Union representatives in non-work areas of the plant on non-working time for two years to permit Union representatives to attend any Company meeting concerning Union representation and to have equal time to address the employees; and to permit the Union a 30-minute meeting with

employees on working time between two and ten days prior to any election in which the Union participates within two years (App. C6 - C8).

C. The Court of Appeals

Both the Company and the Union sought review of the Board's Order. The court of appeals upheld the Board's refusal to issue a bargaining order[1] and enforced the Board's order except for the requirement that the Company President read the Board's notice to the gathered employees (App. B22 - B24).

On February 28, 1981, the Court denied the Union's Petition for Rehearing (App. C1 - C2).

REASONS FOR DENYING THE WRIT

Section 10(c) requires the Board to issue orders directing "such affirmative action...as will effectuate the policies of the Act..." 29 U.S.C. §160(c). The "affirmative action" clause is not a mere charter of authority that the Board has the option to exercise or ignore. It is, as this Court has stated, a "broad command." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 369 U.S. 258, 262 (1969). The Board's excercise of discretion in the formulation of an appropriate affirmative remedy is subject to limited judicial review: "The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act'." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). The remedies selected by the Board in the instant case are among those authorized by Section 10(c).

This Court has previously rejected the Company's primary assertion, that the grant of access deprives it of private property rights. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court reviewed the necessary accommodations between an employer's private property rights and the Section 7 rights of the employees.

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[1] The Union's petition for a Writ of Certiorari on this issue is pending before the Court. *Teamsters Local Union No. 115 v. NLRB*, Docket No. 80-1995.

It concluded that in "each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." *Id.* at 522. The Court's subsequent decision in *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978), does not affect the Board's status as the primary accommodator; to the contrary, *Sears* holds that the Board's authority is primary and that the state's secondary authority may be invoked only where there is no practical method for Board resolution of the dispute. *Id.* at 201-202. In *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), the Court held that absent other unfair labor practices, an employer may lawfully deny non-employee union organizers access to company property. As the court of appeals properly held (App. B16), however, *Babcock & Wilcox* does not deal with the Board's remedial powers. Consistent with the Court's opinions, the Board may direct an employer to grant a union access to the employer's property to remedy the employer's unfair labor practices.

Courts have enforced Board orders giving a union access to employer bulletin boards in a number of cases. *See, e.g., J.P. Stevens & Co. v. NLRB,* 623 F.2d 322, 327 (4th Cir. 1980), *cert. denied,* _____ U.S. _____; *Decaturville Sportswear Co. v. NLRB,* 406 F.2d 886, 889 (6th Cir. 1969) and cases cited therein; *J.P. Stevens & Co. v. NLRB,* 417 F.2d 533, 540 and nn. 14-15 (5th Cir. 1969). It is not significant that the Company did not utilize the bulletin boards to campaign against the Union. It is significant that the Company fired employees for their union activities, warned workers not to associate with union adherents, and fired one employee for chatting with employees on the picket line. The Union can use the more "impersonal" bulletin boards to reduce employee apprehension of incurring further discipline, *Ibid.*

Courts have also enforced Board orders granting union organizers access to company property to meet employees, to reply to captive audience speeches, and to make a pre-election speech. *See, e.g., J.P. Stevens & Co. v. NLRB,* 623 F.2d 322, 327 (4th Cir. 1980), *cert. denied,* _____U.S. _____; *Montgomery Ward & Co. v. NLRB,* 339 F.2d 889, (6th Cir. 1965); *NLRB v. Crown Laundry & Dry Cleaners,* 437 F.2d 290, 294 (5th Cir. 1971); *Decaturville Sportswear Co. v. NLRB,* 406 F.2d 886, 889

(6th Cir. 1969); *J.P. Stevens & Co., Inc. v. NLRB*, 461 F.2d 490, 495 (4th Cir. 1972); *NLRB v. J.P. Stevens & Co., Inc.*, 563 F.2d 8, 25 (2d Cir. 1977). These remedies are necessary to permit the Union to wage an effective organizational campaign, as it was doing before the Company's flagrant unfair labor practices.

The Company's secondary assertion, that the unfair labor practices it committed do not warrant such severe relief, requires this Court to review the Board's discretion in the choice of remedies. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

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